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No. 300

In the Supreme Court of the United States

OCTOBER TERM, 1944

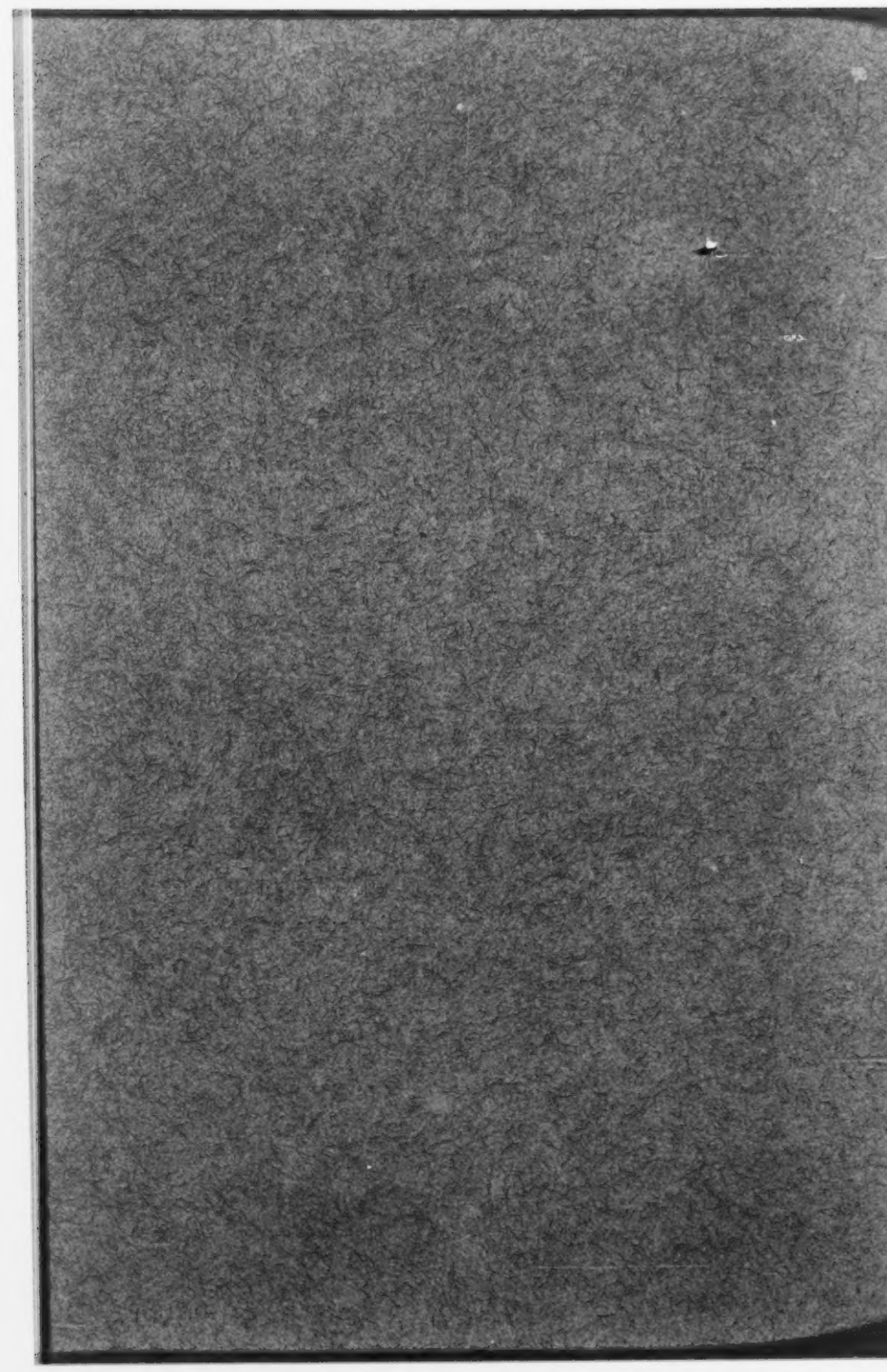
JACOB DVORKIN, PETITIONER

v.

THE UNITED STATES

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS**

BRIEF FOR THE RESPONDENT IN OPPOSITION



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(1)



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OPINION BELOW

The opinion of the Court of Claims (R. 11-12) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on April 3, 1944 (R. 12). A motion for a new trial was overruled on May 1, 1944, and motion for leave to file a second motion for a new trial was overruled on July 10, 1944 (R. 12-13). The petition for a writ of certiorari was filed on July 28, 1944. The jurisdiction of this Court is invoked under Section 3 (b) of the

Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

1. Whether the court below correctly construed the original petition and amended bill of particulars as failing to aver appointment of petitioner to the position of driver-mechanic in the Postal Service.

2. Whether petitioner, a postal employee assigned to duty as a garageman-driver, but performing the duties of a driver-mechanic without being appointed to that position, is entitled to the statutory compensation prescribed by law for a driver-mechanic.

STATUTES INVOLVED

The relevant portions of the statutes involved are set forth in Appendix A, pp. 10-11, *infra*.

STATEMENT

Petitioner, a postal employee, filed a petition in the Court of Claims, seeking to recover \$1,200, alleged to be the difference between the pay of a substitute garageman-driver (55¢ per hour) which he received from April 1, 1938, to October 27, 1941, and the higher pay of a substitute driver-mechanic (65¢ per hour) for the same period (R. 1-4). The petition nowhere alleged that petitioner was appointed a driver-mechanic but merely alleged that "on April 1, 1938, he was appointed to that branch of the Post Office Department"

requiring the services of garagemen-drivers, driver-mechanics, and certain other types of employees, named in Section 6 of the Reclassification Act of 1925 (R. 1). The petition further alleged that it was "expressly understood and agreed" that while petitioner was employed "under said appointment" a record would be kept of the number of hours he worked as a garageman-driver and as a driver-mechanic, respectively, and that he would be paid 55¢ per hour when employed as a garageman-driver and 65¢ per hour when employed as a driver-mechanic, in accordance with the rates fixed by Section 6 of the Reclassification Act of 1925; that no such record was kept; and that "during practically all his employment" he performed the services of a driver-mechanic but was paid only the compensation fixed for a garageman-driver (R. 1-2).

The United States filed a motion, granted by the court below (R. 4), for a bill of particulars to explain, among other things, the particulars concerning the alleged express understanding and agreement for dual employment, and the nature of petitioner's alleged "appointment" to office. Appended to the motion, as Exhibit A, was a copy of a record of the New York Post Office, signed by petitioner and the Postmaster, showing petitioner's assignment to duty on April 1, 1938, as a Temporary Substitute Garageman-Driver.¹

¹ The record before this Court fails to include this motion. Inasmuch as it is referred to in the amended bill of particulars (R. 4, 7) and because it is helpful in appraising the

On October 30, 1943, petitioner filed his bill of particulars which, as amended on January 22, 1944 (R. 4-7), did not amplify the averments with respect to the alleged express understanding and agreement, but included allegations that "The claimant was duly appointed as a driver-mechanic"; that "Upon his assignment to the Post Office Department for duty" he was required to take a non-competitive examination as a driver-mechanic; that he passed the examination and was assigned to the duties of a driver-mechanic; and that "The act of requiring claimant to take a non-competitive examination as driver-mechanic before being allowed to work and his assignment to the duties of the classification for which he had successfully passed an examination constituted his appointment as driver-mechanic." The bill of particulars nowhere denied the authenticity of Exhibit A but alleged that it was "one of the steps in carrying out the fraud which was perpetrated" upon petitioner "by the representatives of the Civil Service Commission and the Post Office Department," who, knowing there were no "vacancies" for garagemen-drivers, assigned to the duties of driver-mechanics, at the pay of garagemen-drivers, persons from the Civil Service list of eligibles for garagemen-drivers who were able to pass a test as driver-mechanics (R. 4-5).

allegations thereof, the motion is set forth in Appendix B, pp. 12-14, *infra*.

On December 27, 1943, the United States demurred to the petition (R. 11). The court below sustained the demurrer and dismissed the petition (R. 12) on the ground that the "test of a person's right to salary" is "not the duties performed, but the position or grade to which appointed" and that petitioner had avoided "alleging the character of his 'assignment' to the Post Office Department," which "is the determinative question" (R. 12).

ARGUMENT

The court below properly ruled that petitioner's allegations failed to establish a right to the salary of a driver-mechanic during the claim period.

1. The Court of Claims has heretofore held that a person appointed to the position of garage-man-driver, but performing the duties of a driver-mechanic, is not entitled to the compensation of a driver-mechanic. *Coleman v. United States*, 100 C. Cls. 41. This holding merely reaffirmed the well-established rule that the right to the salary of an office or position does not accrue simply from the performance of the duties of that office but is dependent upon appointment to that office by the person authorized to make the appointment. See *Belcher v. United States*, 34 C. Cls. 400, 421; *Morey v. United States*, 35 C. Cls. 603; *Barrett v. United States*, 37 C. Cls. 44, 48; *Jackson v. United States*, 42 C. Cls. 39.

The holding of the court below that petitioner did not allege his appointment to the office of

driver-mechanic is plainly correct. No such allegation appears either in the complaint, or in the bill of particulars (R. 4-7) filed by petitioner in response to the specific inquiry directed by the Government to the nature of petitioner's appointment. While it is true that the amended bill of particulars states that "The claimant was duly appointed as a driver-mechanic," the remainder of the bill shows that this statement is a legal conclusion, for the bill then explains that upon "assignment to the Post Office Department for duty" petitioner was required to take an examination as a driver-mechanic (which he passed) and that "The act of requiring claimant to take a noncompetitive examination as driver-mechanic before being allowed to work and his assignment to the duties of the classification for which he had successfully passed an examination constituted his appointment as a driver-mechanic" (R. 4-5).² If petitioner in fact had been appointed driver-mechanic, it would have been a simple matter so to aver directly in either his original petition (R. 1-4) or one of his two bills of particulars (R. 4-7).³

² Moreover, at a later point in the bill of particulars, petitioner states that "Under the theory of law *he was entitled to assume* that the Post Office official in charge had complied with the law and *that he had been appointed* and was employed and was entitled to receive the pay of driver-mechanic" (R. 7). [Italics supplied.]

³ In order to dissipate any notion that petitioner was a victim of technicalities of pleading, and that an appoint-

2. Petitioner relies upon regulations or announcements of the Post Office Department allegedly entitling him to promotion or appointment to the position of driver-mechanic (Pet. 3-4). But it is settled that it is the actual appointment or promotion that controls and not the right thereto. *United States v. McLean*, 95 U. S. 750; *Morey v. United States*, 35 C. Cls. 603. *Glavey v. United States*, 182 U. S. 595, from which petitioner quotes at great length (Pet. 5-8), affords him no support, for it involves a suit for the salary of an office by a person actually appointed to that office. Similarly, petitioner's reliance upon Section 6 of the Reclassification Act, Appendix A, p. 10, *infra*, is unwarranted, for that Act merely prescribes the

ment to the position of driver-mechanic could have been factually alleged, there are set forth in Appendix C, pp. 15-18, *infra*, records of the Post Office Department relating to petitioner's appointments for the claim period, and a transcript of petitioner's service record in the Civil Service Commission. These show petitioner's name accompanied by the designation "Temporary Substitute Garageman-Driver," and later "Substitute Garageman-Driver," but never "Driver-Mechanic." Moreover, petitioner has nowhere alleged the receipt or existence of any document designating him as a "driver-mechanic" during the claim period. The Court of Claims has consistently held that an employee's designation upon the records of the department in which he is employed, rather than the services he performs, is determinative of the office to which he has been appointed. *Jackson v. United States*, 42 C. Cls. 39; *Barrett v. United States*, 37 C. Cls. 44; *Belcher v. United States*, 34 C. Cls. 400, 421.

salaries that are to attach to the positions named therein and nowhere purports to change the established rule that one must be appointed to an office before being entitled to the salary attached to such office.

Petitioner's claim is, in substance, an attempt to have applied retroactively a regulation and appointment given him thereunder on November 16, 1941, to serve in a dual capacity. This appointment was made (see Appendix C, p. 15, *infra*) by authority of an order of the Fourth Assistant Postmaster General, issued October 27, 1941, and effective November 16, 1941, establishing a dual employment system. Postmasters were empowered to certify to the Bureau of the Fourth Assistant Postmaster General the names of garagemen-drivers who had passed a practical driving test and to recommend their appointment as temporary substitute driver-mechanics (Government Owned Motor Vehicle Service Rules and Regulations, Post Office Department, 1943, pp. 93-94). Upon approval of such recommendation, an appointee became a "garageman-driver (driver-mechanic)" and was entitled to the salary of a driver-mechanic while actually assigned to driving duties. But since the regulation was not promulgated and petitioner's new appointment was not made until after the claim period, he can draw no support from their provisions.⁴

⁴ While the order of the Fourth Assistant Postmaster General was expressly based upon written authority from the

CONCLUSION

The decision below is correct, and there exists no conflict. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

FRANCES M. SHEA,
Assistant Attorney General.

DAVID L. KREEGER,
Special Assistant to the Attorney General.

JOSEPH B. GOLDMAN,
Attorney.

AUGUST 1944.

Civil Service Commission, the underlying statutory authority apparently included the Act of March 1, 1929, Section 1, ch. 442, 45 Stat. 1441, 39 U. S. C. 136 (see Appendix A, pp. 10-11, *infra*), permitting the employment of postal employees in a dual capacity "when in the judgment of the Postmaster General" such employment is required by "the needs and interests of the Postal Service" and provided that "the total compensation actually paid for all services does not exceed \$2,000 for any one fiscal year." This statute is of no avail to petitioner for the claim period, since (1) his original petition and amended bill of particulars fail to allege that he was actually appointed to serve in a dual capacity, and that his total compensation, if recovery were allowed, would not exceed \$2,000 for any one year; and (2) the Postmaster General (through the Fourth Assistant Postmaster General, who by Section 14 (5) of the Postal Laws and Regulations, 1932, was charged with the appointment of personnel in the Motor Vehicle Service) did not, prior to October 27, 1941, make either a general or specific determination that employment of petitioner in a dual capacity was in his "judgment" required by "the needs and interests of the Postal Service."

APPENDIX A

STATUTES

1. Section 6 of the Reclassification Act of 1925 (43 Stat. 1053, 1060, 39 U. S. C. 116) provides, in part, as follows:

SEC. 6. That employees in the motor-vehicle service shall be classified as follows: * * *

* * * * *

That driver-mechanics employed in the motor-vehicle service shall be divided into five grades: [setting forth per annum salary for each grade]; and garagemen-drivers employed in the motor-vehicle service shall be divided into two grades: [setting forth per annum salary for each grade]
* * *

That the pay of substitute, temporary, or auxiliary employees in the motor-vehicle service shall be as follows: Special mechanics at the rate of 75 cents per hour; general mechanics at the rate of 70 cents per hour; clerks and driver-mechanics at the rate of 65 cents per hour; and garagemen-drivers at the rate of 55 cents per hour.

* * * * *

2. Section 1 of the Act of March 1, 1929 (45 Stat. 1441, 39 U. S. C. 136), reads as follows:

* * * postmasters and acting postmasters are authorized, when in the judgment of the Postmaster General the needs and interests of the Postal Service require, to employ mail messengers and other postal

employees in a dual capacity, or to assign extra duties to such mail messengers and other employees; and, notwithstanding the provisions of sections 1763, 1764, and 1765 of the Revised Statutes, as amended (United States Code, title 5, sections 58, 69, and 70), compensation shall be paid to such mail messengers and other employees for such services if the total compensation actually paid for all services does not exceed \$2,000 for any one fiscal year.

APPENDIX B

In the Court of Claims of the United States

No. 45912

JACOB DVORKIN

v.

THE UNITED STATES

DEFENDANT'S MOTION FOR BILL OF PARTICULARS

Now comes the defendant, by its Assistant Attorney General, and moves the Court to require the plaintiff to file, within 20 days, or such other time as may be fixed by the Court, a duly verified bill of particulars making more definite and certain the allegations of paragraph 3 of the petition, by setting forth the following:

1. A statement as to whether or not the appointment of April 1, 1938, alleged in said paragraph, was the same appointment that was effectuated by, or made in connection with, the instruction of the Postmaster of the New York Post Office, dated April 1, 1938, a photostatic copy of which is appended hereto and marked "Exhibit A," and whether or not the plaintiff is the same Jacob Dvorkin named therein and whose signature appears thereon: and, if the statement in response to the foregoing is not in the affirmative, or if the plaintiff relies on some other or additional appointment, then the original or a copy of the document effectuating such alleged appointment or, if

this cannot be done, then an additional statement explaining why it cannot be done, and identifying the officer who made the alleged appointment and giving the title of the position to which such officer purported to appoint the plaintiff.

2. A statement as to whether or not the plaintiff relies exclusively upon the statutory provision quoted in paragraph 2 of the petition as constituting the express understanding and agreement alleged in paragraph 3 thereof, and if not, the original or a copy of any written contract which may be relied upon, or, if there is no such written contract, a statement identifying the officer who entered into the alleged understanding or agreement on behalf of the defendant, and the time and place thereof, and any other circumstances or events relied upon by the plaintiff as having given rise to such alleged contractual obligations.

MEMORANDUM

* * * * *

Respectfully submitted.

FRANCIS M. SHEA,

Assistant Attorney General.

ENOCH E. ELLISON,

Attorney.

EXHIBIT A

1073

N. Y. 75-A

J. J. M.

POST OFFICE, NEW YORK, N. Y.,

OFFICE OF THE POSTMASTER.

Employee must not be employed before the date indicated below.

P. O. GARAGE APRIL 1, 1938

SUPERINTENDENT,
34th St. 11th Ave.

The bearer, Jacob Dvorkin-----
has been instructed to report to you for duty as
TEMP. SUB. GARAGEMAN DRIVER

Employee must sign his name on line below in
presence of superintendent before proceeding to
another station.

(signed) JACOB DVORKIN
(Signature of employee)

vice -----

Residence 2314 Crotona Ave. Badge or Cap No.
----- Salary, \$55¢ hr. Bond, \$1000.

Please fill in the report below and return this
blank to Room 215 immediately, countersigned
by bearer.

POSTMASTER.

The above-named employee reported on Apr 1
1938 and has been assigned to duty as a T S
Garageman Driver commencing with Apr 1 1938
(Designation)

(signed) JOHN H. DALEY, *Superintendent*
M. C.

Countersigned, JACOB DVORKIN.

5-6988

APPENDIX C

UNITED STATES CIVIL SERVICE COMMISSION

SERVICE RECORD DIVISION

Dworkin		Jacob
(Surname)		(Given name)
11-7-10	New York	No
(Date of birth)	(Legal residence)	(Charged)
Military preference?		None
(Examination from which appointed)		
Temporary Appointment - Section 1 Civil		
Service Rule VII		
(If not appointed from examination state authority)		

SERVICE HISTORY

4-1-38 Temporary Appointment Substitute Garageman-Driver, \$.55 per hour, Post Office, Motor Vehicle, New York City

4-30-41 Terminated

5-1-41 Probational Appointment Substitute Garageman-Driver, \$.55 per hour, Post Office, Motor Vehicle, New York, N. Y.

(Substitute Garageman Driver Examination 70.50%, 1937, Second U.S. Civil Service Region)

10-2-41 Probation completed

11-16-41 Change in Status to Dual Designation Substitute Garage-man-Driver \$.55 per hour, Substitute Driver-Mechanic, \$.65 per hour

(Passed test 11-10-41 for position of Substitute Driver-Mechanic and may be used in either position)

5-16-44 Transfer Substitute Carrier, foot of roll, \$.65 per hour, Post Off. Service, New York, N.Y.

(Eligible on Junior Investigator Examination, 72.5756, Competitive, 1939)

Form 1472
Sept. 1939

(Initials of transcriber)

1rs 8-19-44



APPOINTMENT OF SUBSTITUTE MOTOR VEHICLE EMPLOYEE

United States Post Office

New York, New York
(Office and State)

APR 1, 1938
(Date)

Fourth Assistant,

(Division of Motor Vehicle Service).

I recommend the appointment as substitute temporary
of the persons named below, at 55¢ per hour, Garageman Driver
Under Civil Service Rule 7, Section 1, (Insert description)
For an indefinite period.

Postmaster.

Names appear on Certificate C-357.

I certify that the selections are regular, under
Section 1 Rule 7.

April 1, 1938
(Date)

Secretary

Civil Service District.

NAME	DATE OF BIRTH	CIVIL SERVICE RATING	TO DATE FROM	REMARKS
Ginex, Joe	11-15-08	88.50	Apr. 1, 1938	
Springer, Harry	5-27-04	83.33	"	
Dvorkin, Jacob	11-7-10	70.50	"	

Approved: APR 7 1938

Fourth Assistant